

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

IN RE: Petition of South Carolina Electric & Gas)	
Company for Prudency Determination)	DOCKET NO. 2017-244-E
Regarding Abandonment, Amendments to the)	Motion to Dismiss
Construction Schedule, Capital Cost Schedule)	
and Other Terms of the BLRA Orders for the)	
V.C. Summer Units 2 and 3 and Related)	
Matters, along with a Motion for Expedited)	
Hearing)	
IN RE: Application of South Carolina Electric & Gas)	DOCKET NO. 2017-246-E
Company for Approval to Revise Rates under)	Motion to Administratively Close
the Base Load Review Act)	Docket, or in the Alternate,
)	Motion to Dismiss

Introduction

1. Pursuant to 10 S.C. Code Ann. Regs 103-829 and S.C. Code Ann. §§ 58-4-50, 58-33-230(F), 58-33-277(B), and other applicable law, the South Carolina Office of Regulatory Staff (“ORS”) respectfully submits this Motion requesting the Public Service Commission of South Carolina (the “Commission”) to:

- a. Dismiss the Petition filed by South Carolina Electric & Gas (“SCE&G”) in Docket No. 2017-244-E because it seeks relief pursuant to inapplicable provisions of the Base Load Review Act (“BLRA”), specifically, S.C. Code § 58-33-270(E) and revised rates;
- b. Administratively close Docket No. 2017-246-E, or in the alternate, dismiss SCE&G’s request for revised rates under that Docket;

- c. Find S.C. Code Ann. § 58-33-270(E) inapplicable to the abandonment of the construction of two nuclear units, Unit 2 and Unit 3, (the “Units”) that were to be located at the VC. Summer Nuclear Station near Jenkinsville, South Carolina (the “abandonment”);
- d. Find that revised rates sections 58-33-280(A) through (J) are not the correct statutory subsections for the setting of rates as a result of SCE&G’s abandonment;
- e. Find that the use of a revised rates proceeding for implementation of abandonment costs into rates is improper;
- f. Find that the proper statute for a Commission Order on abandonment, recovery of capital costs, and rate setting resulting from the abandonment is S.C. Code § 58-33-280(k); and
- g. Any other relief the Commission deems appropriate.

Background

- 2. SCE&G is a public utility regulated by the Commission.
- 3. SCE&G is 55% owner of the Units and Santee Cooper, an entity not regulated by the Commission, owns the remaining 45%.
- 4. ORS is a statutory party pursuant to S.C. Code Ann. § 58-4-10(B) in all matters before the Commission and is charged by law with the duty to represent the public interest of South Carolina in utility matters.
- 5. SCE&G requested and was granted a Base Load Review Order (“BLRA Order”) for the construction of the Units pursuant to the BLRA, specifically S.C. Code Ann. § 58-33-270, in Commission Docket No. 2008-196-E, Order No. 2009-104(A).

6. SCE&G is the only utility with a BLRA Order.¹
7. The BLRA specifically addresses ORS's charge of safeguarding the public interest. S.C. Code Ann. § 58-33-230(F).
8. On December 27, 2016, Toshiba Corporation, Westinghouse Electric Corporation, LLC's ("WEC") parent company, announced a significant liability associated with WEC's nuclear business in South Carolina and Georgia.
9. On March 29, 2017, WEC filed for bankruptcy in the United States Bankruptcy Court Southern District of New York.
10. On April 12, 2017, SCE&G provided an allowable ex parte briefing to the Commission. In that briefing, SCE&G stated that it was currently evaluating four options for the Units: 1) continue with construction of the Units; 2) focus on construction of one of the two Units and delay construction of the other; 3) continue with construction of one unit, abandon the other, and seek recovery of the abandoned unit under the BLRA; or 4) abandon both Units and seek recovery under the BLRA.
11. On July 31, 2017, SCE&G issued a public release stating it was ceasing construction of the Units and filing a plan of abandonment for the Units under the terms of the BLRA.
12. On August 1, 2017, SCE&G made two filings with the Commission: 1) a Petition for "Prudency Determination Regarding Abandonment, Amendments to the Construction Schedule, Capital Cost Schedule and Other Terms of the BLRA Orders for the V.C. Summer Units 2 & 3 and Related Matters" (the "Petition") which the Commission assigned to Docket No. 2017-

¹ There are two paths in the BLRA under which a utility may seek authority: 1) a request for a preconstruction order or 2) a request for a Base Load Review Order ("BLRA Order"). SCE&G was granted a BLRA Order. Duke Energy Carolinas, LLC was granted a preconstruction order pursuant to S.C. Code § 58-33-225 via Order Nos. 2008-417 and 2011-454 to allow pre-construction costs.

244-E and 2) a Notice of Intent that SCE&G intends to file a request for revised rates under the BLRA which the Commission assigned to Docket No. 2017-246-E.

13. The Petition was filed pursuant to the provisions of the BLRA, S.C. Code Ann. §§ 58-33-270(E) (a “Modification Proceeding”) and 58-33-280(k) (the “Abandonment Section”) (2015).

14. The Petition, among other things, seeks permission to apply approximately \$4.9 billion of capital costs to rates through a separate revised rates proceeding. See Petition paragraph no. 42 and the first paragraph on the second page of the Proposed Notice of Filing and Hearing and Prefile Testimony Deadlines included with the Petition. Specifically, the Petition requests the “Commission authorize and direct SCE&G ... to include a revenue component in the adjustment to rates that will be implemented in the 2017, Revised Rates Proceeding which shall be sufficient to amortize the Capital Costs over 60 years (the “Amortization Charge”); [and] to effect the recovery of the Amortization Charge initially through revised rates under S.C. Code Ann. § 58-33-280 and subsequently as a component of retail electric base rates when new electric base rates are approved for SCE&G in future proceedings under S.C. Code Ann. §§ 58-27-810 *et seq.*...” Petition paragraphs no. 48(d) and 48(e).

15. SCE&G’s August 1, 2017 Notice of Intent filed in Docket No. 2017-246-E states SCE&G intends to file in accordance with the BLRA a request for revised rates not earlier than thirty (30) days from August 1, 2017. Revised rates procedures are set forth in S.C. Code § 58-33-280(A) through (J).

16. In sum, SCE&G is seeking a Commission determination of the capital costs for abandonment and a modification of its BLRA Order in Docket No. 2017-244-E and to apply the approved capital costs to rates through a revised rates proceeding in Docket No. 2017-246-E.

Analysis and Support for Motion to Dismiss

17. SCE&G's Petition is filed pursuant to S.C. Code §§ 58-33-270(E) and 58-33-280(k) and seeks the utilization of revised rates. It is ORS's position a determination for capital costs and rates in abandonment should be filed solely under S.C. Code § 58-33-280(k). The Petition's addition of the S.C. Code §58-33-270(E) Modification Proceeding and request for revised rates results in distinctions that greatly advantage and protect SCE&G. ORS respectfully submits that these protections are inapplicable in an abandonment. The project for the Units is out of compliance with the most recent BLRA Order. SCE&G is presumably seeking to modify its BLRA Order so that the project returns to being compliant and SCE&G is entitled to revised rates. However, a BLRA Order's main objective is to approve a construction schedule and budget, which has no place in abandonment. In addition, a S.C. Code § 58-33-270(E) Modification Proceeding places the burden on ORS and intervenors. Similarly, revised rates is a paper proceeding where the burden is also on ORS and intervenors, but has no intervention until *after* the Commission issues its order. Where the Commission is faced with a legal question, it must ascertain legislative intent which should be derived from the plain language of the statute. S.C. Code § 58-33-280(k) addresses the abandonment of a BLRA Order and does not state that the BLRA Order must be modified or that revised rates is the mechanism by which abandonment costs are recovered. SCE&G should not be allowed to use non-abandonment portions of the BLRA to shield itself from scrutiny and shift the burden of proof. This paragraph is discussed further below.

18. While this Motion seeks dismissal on grounds that the Petition was filed under inapplicable portions of the BLRA, a dismissal will assist by providing time before rates are sought by allowing:

- a. South Carolina Governor Henry McMaster to thoroughly explore options for continued construction²;
- b. The V.C. Summer Nuclear Project Senate Review Committee to review all aspects of the project for the Units³;
- c. The Utility Ratepayer Protection House Committee to review what led to the current status of the Units and determine a plan;
- d. The South Carolina Public Utilities Review Committee, composed of Senators, Representatives and members of the public to meet August 23, 2017 and take action as it deems appropriate; and
- e. Attorney General Alan Wilson to investigate.⁴

A. Abandonment Section, S.C. Code § 58-33-280(k).

19. S.C. Code § 58-33-280(k) is the BLRA section that specifically addresses abandonment of a project which has a BLRA Order.

20. S.C. Code § 58-33-280(k) states the following:

(K) Where a plant is abandoned after a base load review order approving rate recovery has been issued, the capital costs and AFUDC related to the plant shall nonetheless be recoverable under this article provided that the utility shall bear the burden of proving by a preponderance of the evidence that the decision to abandon construction of the plant was prudent. Without limiting the effect of Section 58-33-275(A), recovery of capital costs and the utility's cost of capital associated with them may be disallowed only to the extent that the failure by the utility to anticipate or avoid the allegedly imprudent costs, or to minimize the magnitude of the costs, was imprudent considering the information available at the time that the utility could have acted to avoid or minimize the costs. The commission shall order the amortization and recovery through rates of the

² Jamie Self, *Sell Santee Cooper? All Options on Table, Leaders Say*, The State, August 9, 2017, at 1A and 6A.

³ Bristow Marchant, *SC Lawmakers to Review Utilities After Nuclear Project Fails*, The State, August 8, 2017.

⁴ Andrew Brown, Andy Shain, and Maya T. Prabhu, *Attorney General Says He's Investigating Abandonment of Nuclear Reactors; South Carolina State Senators Call for Special Session*, The Post and Courier, August 4, 2017.

investment in the abandoned plant as part of an order adjusting rates under this article.

21. Thus, S.C. Code § 58-33-280(k) is the section that should be utilized for the determination of abandonment costs and rate recovery from ratepayers.⁵

22. Further, S.C. Code § 58-33-280(k) places the burden with SCE&G to show prudence in abandonment. It requires that costs in general be minimized and imprudent costs be avoided.

23. The Abandonment Section does not require that SCE&G's existing BLRA Order be modified or that revised rates be utilized as SCE&G has requested in its Petition.

B. Modification Proceeding, S.C. Code § 58-33-270(E)

24. The Modification Proceeding statute, S.C. Code § 58-33-270(E) states:

(E) As circumstances warrant, the utility may petition the commission, with notice to the Office of Regulatory Staff, for an order modifying any of the schedules, estimates, findings, class allocation factors, rate designs, or conditions that form part of any base load review order issued under this section. *The commission shall grant the relief requested if, after a hearing, the commission finds:*

(1) as to the changes in the schedules, estimates, findings, or conditions, that *the evidence of record justifies a finding that the changes are not the result of imprudence on the part of the utility;* and

(2) as to the changes in the class allocation factors or rate designs, that the evidence of record indicates the proposed class allocation factors or rate designs are just and reasonable. (Emphasis added.)

25. Contrary to the Abandonment Section, a Modification Proceeding places the burden on ORS or intervening parties to show SCE&G was imprudent.

⁵ ORS is not seeking to impede general rate proceedings, only the use of incorrect and inappropriate sections of the BLRA in an abandonment.

26. Unless a party can prove SCE&G acted imprudently, the Commission must grant SCE&G's request in a Modification Proceeding. The effect is that S.C. Code § 58-33-270(E) of the BLRA allows SCE&G to assign fault and delegate responsibility to a third party, mainly WEC and WEC's predecessors. ORS and intervening parties are prohibited from placing on SCE&G the costs caused by the mismanagement of WEC and WEC's predecessors in the construction of the Units. The ability for a utility holding a BLRA Order to delegate imprudency to a third party sets forth an exception to South Carolina utility ratemaking principals. For instance, and in a matter outside of the BLRA, the Court found that for recovery of fuel costs under S.C. Code § 58-27-865, a utility cannot insulate itself by delegating irresponsible decision-making authority to a third party. Hamm v. S.C. Pub. Serv. Com., 291 S.C. 119, 123, 352 S.E.2d 476, 478 (1987). In abandoning the Units, SCE&G should not be able shield itself from the imprudent actions of its contractors.

27. The Modification Proceeding section is not appropriate to use in an abandonment, because it makes no reference to abandonment.

28. A Modification Proceeding must have an order issued by the Commission within six months. S.C. Code § 58-33-270(F). In contrast, the Abandonment Section does not specify a time limit for a Commission decision or final order. Six months is far too short a time to conduct the appropriate analysis, discovery, testimony, hearing and order that a multi-billion dollar decision warrants.

29. In SCE&G's five prior modification proceedings, SCE&G successfully modified its BLRA Order to revise the construction budget and/or schedule for the Units. A BLRA Order is required to specify the anticipated construction schedule, anticipated capital costs and that the utility's decision to proceed with construction is prudent and reasonable. S.C. Code § 58-33-

270(A) and (B). Here, if SCE&G is allowed to proceed with its modification request and unless a party can prove imprudence, SCE&G's BLRA Order must continue to specify a construction schedule and a determination that the construction is prudent. This makes no sense in abandonment where a construction schedule is irrelevant.

30. In addition, SCE&G is no longer in compliance with its current BLRA Order, Order No. 2016-794. Order No. 2016-794 modified SCE&G's substantial completion dates to August 31, 2019 and 2020 for Units 2 and 3, respectively, and the Petition shows these dates are no longer viable.

31. SCE&G's reason for seeking the modification of its BLRA Order may be found within S.C. Code § 58-33-275(C). S.C. Code § 58-33-275(C) states, "So long as the plant is constructed or being constructed in accordance with the approved schedules, estimates, and projections set forth in [the BLRA Order]..., *the utility must be allowed to recover its capital costs related to the plant through revised rate filings or general rate proceedings.*" (Emphasis added.)

32. If the existing BLRA Order is modified pursuant to S.C. Code § 58-33-270(E), then SCE&G may posit that it is now in compliance with its BLRA Order and entitled to recover its capital costs via revised rates as allowed by S.C. Code § 58-33-275(C).

33. In summary, there is no need or requirement to modify SCE&G's BLRA Order. Construction has ceased, and SCE&G is seeking to abandon the Units. A Modification Proceeding places the burden on ORS and intervenors to show imprudence and entitles recovery of capital costs. The burden of proof should be on SCE&G, and SCE&G should not be able to insulate itself from the actions of its contractors. The Modification Proceeding statute, S.C. Code § 58-33-270, is inapplicable to an abandonment. Rather, the code section dealing specifically with abandonment, S.C. Code § 58-33-280(k), is the appropriate statute under which to proceed.

C. Revised Rates, S.C. Code § 58-33-280(A) through (J)

34. After the Commission makes a decision on the abandonment costs, SCE&G requests in its Petition to place the costs in rates via a revised rates proceeding or proceedings. SCE&G has filed a Notice of Filing for revised rates which has been assigned Docket No. 2017-246-E. SCE&G's Petition and the Petition's accompanying Proposed Notice of Filing requests costs as of September 2017, which are approximately \$4.9 billion, to be placed in revised rates and reads as if future revised rates proceedings could be utilized to place into rates costs after September 2017. It is ORS's position that the revised rates procedures should not apply to abandonment.

35. Revised rates is not the proper process to implement rates subsequent to an abandonment, because the language within the Abandonment Section of the BLRA, S.C. Code § 58-33-280(k), does not require any revised rates proceeding.

36. Recovery of rates through revised rates is an entitlement so long as there is compliance with the BLRA Order's schedule, estimates and projections. S.C. S.C. Code § 58-33-275(C) states, "So long as the plant is constructed or being constructed in accordance with the approved schedules, estimates, and projections set forth in [the BLRA Order]..., the utility must be allowed to recover its capital costs related to the plant through revised rate filings or general rate proceedings." As stated above, the construction is no longer in compliance with the most recent BLRA Order and SCE&G is seeking to modify its BLRA Order so that it is in compliance.

37. Under revised rates, the utility is entitled to adjust rates every twelve months. Abandonment should not result in the entitlement to annually adjust rates.

38. A revised rates proceeding under the BLRA does not have a public hearing. S.C. Code § 58-33-280(A) through (J). *See also* Order No. 2013-622 confirming no hearing. A process

for setting rates in an abandonment which excludes a hearing with public input should not be allowed.

39. A revised rates proceeding is a four-month paper proceeding that progresses as follows: SCE&G files to adjust its rates; within two months ORS must provide a report to the Commission; and then within four months of SCE&G's revised rates filing, the Commission must issue a revised rates order granting, modifying, or denying revised rates as filed by the utility. Public comments are permitted; however, there is no intervention or hearing prior to the Commission's order. Only after the Commission's order is issued may intervention, challenges by intervenors, and a hearing take place. S.C. Code §§ 58-33-280(A) through (J), 58-33-285 and 58-33-287. *See also* Order No. 2013-622 confirming no hearing or discovery, and Order No. 2013-514 confirming no intervention prior to the Commission's revised rates order.

40. In addition and similar to S.C. Code § 58-33-270(E), the statutes supporting revised rates place the burden on ORS or a party challenging the costs. S.C. Code § 58-33-275(E) states, "*In cases where a party proves by a preponderance of the evidence that there has been a material and adverse deviation from the approved schedules, estimates, and projections set forth in [the BLRA Order], the commission may disallow the additional capital costs that result from the deviation, but only to the extent that the failure by the utility to anticipate or avoid the deviation, or to minimize the resulting expense, was imprudent considering the information available at the time that the utility could have acted to avoid the deviation or minimize its effect.*" (Emphasis added.) The burden should be on SCE&G.

41. In addition to the burden being on ORS or the parties challenging the revised rates order, discovery is limited. S.C. Code § 58-33-287(C).

42. SCE&G is entitled to earn its weighted average cost of capital under the revised rates procedures. "A utility must be allowed to recover through revised rates its weighted average cost of capital...." S.C. Code § 58-33-280(B). The weighted average cost of capital is defined in the BLRA as based on the capital structure in the utility's last rate proceeding. S.C. Code § 58-33-220(22). Under revised rates, the utility's ROE may not be reduced unless the utility agrees. The Commission's most recent modification order approved a settlement agreement wherein SCE&G agreed to reduce its return on equity ("ROE") for revised rates to 10.25%. Order No. 2016-794. The ROE was 11% in the first BLRA Order, Order No. 2009-104(A). This process seems misplaced and one-sided in favor of rewarding the utility in abandonment. There should not be automatic entitlement to a predetermined ROE set prior to abandonment.

43. There should be flexibility in how the revenue is allocated among customers classes due to abandonment; however, under revised rates proceedings there is no flexibility. S.C. Code § 58-33-270(D).

44. Allowance for funds used during construction is permitted to continue accruing if excluded from a revised rates proceeding unless there is a "conclusive finding that the capital costs were imprudently incurred." S.C. Code § 58-33-287(I). A conclusive finding for imprudence is a high benchmark for ORS and challengers to overcome.

45. In an abandonment, SCE&G should not be permitted the protections provided under revised rates procedures. Intervention should be allowed in determining how abandoned costs are applied to rates and the burden should be on the utility abandoning the project. Accordingly, S.C. Code 58-33-280(k) setting forth the procedure when a plant is abandoned, not the sections detailing revised rates, is the appropriate section under which to proceed.

D. Statutory Construction and Further Analysis Supporting Using only the Abandonment Section, § 58-33-280(k), for Abandonment

46. The Abandonment Section, S.C. Code § 58-33-280(k), does not reference revised rates or indicate that a BLRA Order should be modified when a project is abandoned.

47. If the General Assembly had intended for revised rates to be utilized or for the BLRA Order to be modified in abandonment, it would have stated so in the BLRA. The General Assembly made no such statement or pronouncement. The abandonment of a BLRA preconstruction order, which SCE&G does not have, provides a comparison. When dealing with the abandonment of preconstruction order costs, the statute explicitly states abandonment costs may be recovered in a general rate proceeding or revised rates. "If the utility decides to abandon the project after issuance of a prudency determination under this section, then the preconstruction costs related to that project may be deferred, ..., and may be included in rates in the utility's next general rate proceeding or revised rates proceeding...." 58-33-225(G). The section for abandonment of a BLRA Order contains no such language.

48. There is a difference on who bears the burden between the Abandonment Section (the utility) and the Modification and revised rates proceedings (ORS and intervenors). The Abandonment Section should rule.

49. In summary, the plain reading of the Abandonment Section, S.C. Code § 58-33-280(k), does not support the use of a Modification Proceeding or revised rates.

Conclusion

50. WHEREFORE, ORS respectfully requests the following relief from the Commission. Specifically, that the Commission:

- a. Dismiss the Petition filed by SCE&G in Docket No. 2017-244-E because it seeks relief pursuant to inapplicable provisions of the BLRA, specifically, S.C. Code § 58-33-270(E) and revised rates;
- b. Administratively close Docket No. 2017-33-246, or in the alternate, dismiss SCE&G's request for revised rates under that Docket;
- c. Find S.C. Code Ann. § 58-33-270(E) inapplicable to the abandonment;
- d. Find that revised rates sections 58-33-280(A) through (J) are not the correct statutory subsections for the setting of rates as a result of SCE&G's abandonment;
- e. Find that the use of a revised rates proceeding for implementation of abandonment costs into rates is improper;
- f. Find that the proper statute for a Commission Order on abandonment, recovery of capital costs, and rate setting resulting from the abandonment is S.C. Code § 58-33-280(k); and
- g. Any other relief the Commission deems appropriate.

Respectfully submitted,

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